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Loudon-Monroe HR Association Employment Law Seminar: The Times They Are A Changing At The NLRB

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1

National Labor Relations Board ("Board")

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2

National Labor Relations Board

- Lion Elastomers – Misconduct in context of engaging in protected activity. Returned to a four- factor test from Atlantic Steel.

  1. The place of the discussion
  2. The subject matter of the discussion
  3. The nature of the employee's outburst; and
  4. Whether the outburst was, in any way, provoked by an employer's unfair labor practice.

- Bottom line: more misconduct will be protected when the subject matters involves wages and working conditions.

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- McClaren McComb decision re confidentiality and non-disparagement provisions in severance agreements.
- Employer offered severance agreements with common confidentiality and non-disparagement provisions to bargaining unit member in connection with a RIF.
- NLRB held that offering an agreement with such provisions violated the Act.

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- The confidentiality and non-disparagement provisions were overbroad, and the Board found that offering them in context of an agreement that could subject the employee to suit for breach amounted to threatening the employees for engaging in protected conduct.

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- The decision does not apply to management level personnel.
- If offering severance to non-management employees, focus confidentiality on trade secrets and information sensitive to the business such as cost, customer lists, marketing plans, and not on employee information such as wages and benefits.
- Leave out non-disparagement or tailor it to the company's products or specific practices.
- Include a disclaimer.

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- Stericyle, Inc. Employer work rules and policies.
- What is the appropriate framework for analyzing whether a work rule violates the NLRA on its face?
- Previous Board had held some policies will be lawful and set out a balancing test for analyzing others.

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- Stericycle overruled previous cases and established a new framework for the analysis.
- General counsel must show that the rule has a reasonable tendency to chill employees from exercising their Section 7 rights.
- Board will interpret the rule from the perspective of a reasonable employee who is economically dependent on the employer and thus inclined to interpret an ambiguous rule to prohibit protected activity the employee would otherwise engage in.

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- The reasonable employee interprets rules as a lay person not a lawyer.
- If an employee "could reasonably interpret a rule to restrict or prohibit Section 7 activity" the rule is presumptively unlawful.

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If the General Counsel makes that showing, the employer "may rebut the presumption by proving that the rule advances a legitimate and substantial business interest and that the employer is unable to advance that interest with a more narrowly tailored rule."

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Case-by-case approach which examines the specific language of the rule and the employer interests advanced to justify the rule.

National Labor Relations Board

- Miller Plastic Products – When is the action of a single employee "concerted" for purposes of "mutual aid and protection"?
- During a meeting, the employee raised concerns about Covid protocols and the decision to remain open for business. He was discharged.
- The employer defended on grounds that his action was an "individual gripe" and not "concerted".

National Labor Relations Board

- The Board "consistently found activity concerted when, in front of their coworkers, single employees protest terms and conditions of employment common to all employees."
- Further, activity that in the beginning involves only a speaker and a listener "can be concerted, for such activity is an indispensable preliminary step to employee self-organization."
- Overruled a Trump Board case and returned to earlier standard: The question of whether an employee has engaged in concerted activity is a factual one based on the totality of the record evidence.

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- Wendt Corporation – Unilateral changes in the setting of negotiating for a first contract or after a CBA has expired.
- Once the employees are represented the employer cannot make unilateral changes in terms or conditions of employment.
- An employer may not engage in unilateral conduct based on past practice where the employer retains significant discretion.
- The conduct must be "automatic in nature rather than discretionary." Example: pay raises based on merit vs. based on CPI.

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- Employer may not defend unilateral change in terms and conditions of employment that would otherwise violate the Act based on a past practice from before the employees were represented.
- Discretionary unilateral changes based on past practice developed under an expired management rights clause are unlawful.

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- Tecnocap, LLC - Unilateral changes unlawful.
- Issued on the same day as Wendt, Augus 26, 2023.
- The employer changed to 11 and 12 hour shifts, unilaterally.
- Defended, unsuccessfully, on grounds that employer had past practice of changing shifts.
- Past practice developed under a CBA provision that authorized such discretionary unilateral changes does not constitute a term or condition of employment that allows such changes after the CBA has expired.

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- Cemex Construction Materials - What happens if the employer is presented with a card check or other evidence of majority status and a demand for recognition?
- Previous rule for decades. The employer could refuse to recognize and the union would seek an election.
- The new rule via this case is a huge change.

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- An employer violates the Act by refusing to recognize, on request, a union designated as representative by the majority of employees in an appropriate unit, unless the employer files a petition with the Board (called an RM petition) to test the union's majority status or the appropriateness of the unit.
- What happens if the employer does not file the petition or recognize the union?
- Union files unfair labor practice charges. Board finds employer should have recognized and now must do so.

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- When must the employer file the RM petition?
- "Promptly"
- Absent extraordinary circumstances, will mean within 2 weeks of the demand for recognition.

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- Quickie Elections
- 2023 Rules Speed up further.
- Pre-election hearings about 10 days sooner.
- Written response to election petition 3 days sooner.

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- Posting and distribution of election notices 3 days sooner.
- Voter eligibility and inclusion issues at post-election stage.

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- Elimination of 20 business day waiting period between direction of election and election.
- Regional director will schedule election for "the earliest date practicable" after issuing a decision and direction of election.

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22

QUESTIONS?

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23